Switzerland: the Swiss Foundation Code 2009—from corporate governance to foundation governance

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Abstract

This article covers the development of Foundation Government in Switzerland over the last decade. *SwissFoundations*, which is the Association for grant-making foundations in Switzerland, was the first organization in Europe to publish generally applicable governance guidelines on modern and professional foundation management in the Swiss Foundation Code 2005. Its successor is the Swiss Foundation Code, which was enacted in 2009. The author belonged to the working group that drafted the Swiss Foundation Code, and was the editor of the Code.

Corporate governance

The term corporate governance mainly refers to the structural and organizational aspects of listed companies. Due to the lack of an adequate translation, the very same term is used in the German language.

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Key points

- The *Swiss Foundations* Code 2009 is based on three central principles and 26 descriptions and recommendations regarding foundations, management, furtherance and finances.
- Consequently, classic foundations can refer to a concise Best Practice Code.
- The Code, despite having a European touch, has a specific Swiss background and as such is based on a liberal understanding of foundation governance.
- The Code, representing a European novelty, was followed by a commentary on the Code which endorses the recommendations—the majority of which are based on strategic aspects—as well as includes well-founded and practice-oriented explanations.

Discussion first centred around the different interests of company owners (*principals*) and management (*agents*), ie in Switzerland the shareholders on the one hand and the company management bodies on the other (board of directors and senior management: CEO, CFO, etc.). With diversified shareholding in

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particular, principals always run the risk of the management bodies following their personal interests to the detriment of the legitimate interests of shareholders. This risk therefore has to be countered by appropriately structuring the management and control bodies.

In Swiss business circles, corporate governance has also been at the focus of discussion for years. As a result of the Organisation for Economic Cooperation and Development principles of corporate governance[1] issued in 1999, efforts were made to set up a code of best practice. In 2002 the *Swiss Code of Best Practice for Corporate Governance* came into force.[2] It applies only to listed companies and is mainly intended to take wider account of public shareholder interests. Meanwhile, the corporate governance standards have quickly started to have a broader and deeper effect.

Corresponding activities also started at the lawmaking level. At the beginning of 2005 the Federal Justice and Police Department presented draft legislation on the transparent remuneration of board and management members in listed companies.[3] The new statutory provisions came into force on 1 January 2007.

Common points and differences

After some time, the corporate governance discussion also reached the non-profit area. It soon transpired that the standards established for listed companies were principally valid here as well. The structures and management bodies of non-profit organizations also have to be scrutinized more stringently. This is partly due to civil society's greater awareness of the non-profit sector and to the trend toward scrutiny

rather than trust which has been extended also to non-profit organizations by the 'Audit Society'.

The answers that have to be found for 'appropriate governance for non-profit organizations' however cannot be the same as for companies, from which they differ in several respects such as the following:

- Stakeholder groups
- Ownership conditions
- Purpose
- Legal form
- Civil relations
- Control and supervision
- Remuneration of management bodies (honorary status!)
- Transparency regulations
- Performance measurability
- Public perception.

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Foundation governance

So far there is no standard definition of foundation governance, which is hardly surprising in view of the differences, not only in national legislation. Also within individual jurisdictions civil and fiscal law usually diverge, and even under civil law there are very heterogeneous types and also interpretations of foundations. That is why it is so difficult to define a good standard of governance for the entire non-profit area across jurisdictions.[4]

1. OECD Principles of Corporate Governance, new edition 2004 <http://www.oecd.org>.

2. Economiesuisse—Association of Swiss Companies (Ed.), Swiss Code of Best Practice for Corporate Governance dated 25 March 2002, in force since July 2002 <http://www.economiesuisse.ch>. See also Karl Hofstetter, Corporate Governance in der Schweiz [Corporate Governcance in Switzerland], report in connection with the 'Corporate Governance' working group's results, Zurich, 1 July 2002.

3. Federal journal (BBl) (2005) 5963 <http://www.admin.ch>.

4. The Swiss NPO code describes NPO governance as 'all principles, in the interest of all target groups, that safeguard the management, control and communication of non-profit organizations while ensuring the accountability and efficiency of a responsible organization'.

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The legitimization of foundation governance mainly comes from two sources:

- Foundations have *no owners* like corporations, and *no members* like associations. Therefore the control possibilities applying to owners and members do not apply to them, and structural compensation is necessary.
- Non-profit organizations often receive *tax advantages*. Not only is this a rare exception from the normal fiscal appetite, but also means that the state acknowledges the foundation's existence and activities. And this is also an obligation. The foundation must effectively justify itself to the public about how it used the funds which it did not have to pay towards tax.

Foundation governance in Switzerland

Basis

Liberal foundation law

Switzerland offers excellent framework conditions for grant-making foundations, to which many factors contribute. First, Switzerland enjoys a thriving foundation tradition. Secondly, specialist expertise from the financial and legal services sector is widely available. And lastly, liberal foundation legislation facilitates the establishment and operation of foundations. This is why so many foreign foundations are domiciled in Switzerland, which houses more than 10,000 grant-making foundations. Their estimated assets total around CHF 30 billion, with annual appropriations of around CHF 1–2 billion.

Switzerland offers excellent framework conditions for grant-making foundations

To set up a foundation, it is necessary to draw up a foundation charter defining its purpose and to set aside adequate assets for this purpose. The foundation acquires a legal identity as soon as it is entered in the commercial register.

The following requirements with regard to the highest-ranking body—generally called the foundation board—are hardly or just subsidiarily prescribed by law and are basically to be established by the foundation:

- The number of members
- Requirements on members
- Election, re-election, and voting out of office
- Term of office
- Further training
- Composition and renewal of the foundation board
- Rights, obligations, and responsibilities
- Constitution of the foundation board, in particular the election, voting out of office, term of office, rights, obligations and responsibilities of the chairman, and of board commissions
- The number of board meetings per year, their preparation, and the keeping of minutes
- The passing of resolutions (mode, quorum), and notification of the same
- The handling of conflict of interests

Foundations and their bodies thus have extensive freedom of action. At the same time there is considerable insecurity as to the optimal use of foundations—and just as much theoretical risk of abuse.

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Foundation law revision

On 1 January 2006, a revision of the foundation legislation and foundation tax law came into force,

which is even more liberal.[5] It includes the following innovations and improvements in connection with foundation governance requirements:

- Accounting obligations
- Principal auditing obligations
- The requirement for independent auditors
- Obligations of the foundation board in case of debt or insolvency of the foundation
- Obligations of the foundation board in case the original purpose of the foundation acquires a completely different significance or effect
- Various new aspects with regard to commercial register legislation (eg for greater transparency, all board members must now be entered in the commercial register together with their signatory rights)

During the course of simultaneous revision of the foundation tax law, another liberal signal was sent out by increasing tax deductibility for foundations. Under favourable conditions, potential foundations and donors are offered incentives, but this also represents an obligation for foundations to really fulfil their non-profit mission.

Certification

In recent years, attempts have been made to establish various quality certification labels and recommendations, such as:

- The SQS–NPO label by the Swiss Association for Quality and Management Systems (SQS)[6]
- The ZEWO standards for non-profit institutions[7]
- The Swiss GAAP ARR 21 for social non-profit organizations[8]

Inadequate foundation governance

It must nevertheless be taken into account that foundations have negatively hit the headlines in several

cases during the last few years. This shows that Swiss foundation governance is not yet very professional in some cases, and it would therefore be vain to claim compliance with modern foundation governance requirements.

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The foundation sector is rarely seen as a whole, neither by the public nor by the foundations themselves. There is a lack of transparency, partly due to the fact that many foundations prefer to 'hide their light under a bushel'. There is a tendency to forget that foundations are also here to serve the public good: they can help where the state offers no assistance, or add their weight if they consider that the state is not doing enough. Foundations can thus be part of civil society.

They are still not organized enough, however. Out of more than 10,000 foundations in Switzerland today, only about 300 members belong to one or other of the two relevant associations (proFonds, the umbrella association for foundations in Switzerland and SwissFoundations, the association of Swiss grant-making foundations). Due to the very low degree of organization, reliable data on Swiss foundations are often not available.

Self-regulation efforts

Discussion

The foundation governance discussion in Switzerland became more intensive as of 2002, for the following reasons amongst others:

- the genuine international or universal nature of this discussion;
- various notorious cases of foundation mismanagement; and

5. Cf. Thomas Sprecher, *Die Revision des schweizerischen Stiftungsrechts [Revision of the Swiss Foundation Legislation]* (Schulthess, Zurich 2006).
6. <http://www.sqs.ch>.
7. <http://www.zewo.ch>. These standards are not actually designated as Corporate Governance Standards but de facto they are.
8. <http://www.fer.ch>.

● questions regarding textual aspects of the foundation law revision.

As basis then mainly served the good governance postulates adopted particularly in the USA:

● Assurance of an efficient organization and management structure
● Prevention of mismanagement at a senior level
● Combating the "self-service" mentality at the senior management level
● Professional management of foundation assets
● Improvement of grant policies
● Greater transparency both inward and outward
● Better handling of conflicts of interests

All governance problems endanger the realization of the foundation's purpose. After 11 September 2001, foundation risks, hardly heeded previously, emerged, in particular the possible abuse of foundations for money laundering, terrorism or corruption purposes. This considerably increased the awareness of effective governance requirements among foundation board members.[9]

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Fundamental questions

The following are some of the fundamental questions:

● Which elements of foundation governance should founders consider when establishing a foundation?
● Which rules should founders impose on those appointed to manage foundations and which should be left to the discretion of the management?
● Which measures relating to foundation governance are likely to increase levels of trust amongst the public and potential donors?
● What is the role of founders after a foundation has been established?

● What should the relationship between the board of trustees (strategic level) and management (operational level) be?
● How should the board of trustees be constituted and how should it organize its work?
● What should the role of the chairman of the board of trustees be?
● What other bodies should a foundation set up?
● What other basic documentation should a foundation produce in addition to its foundation charter (regulations, mission statement, etc.)?
● How should bodies set up by a foundation be recompensed?
● What should the influence of the state be? Should the role of the supervisory body be strengthened?
● How should assets of the foundation be invested?
● How should assets of the foundation be distributed?
● How should assets of the foundation be controlled when support is given to third-party projects?
● What should the relationship between the foundation and its beneficiaries and between the foundation and other stakeholders be?
● How should internal and external control mechanisms be structured?
● How should conflicts of interest be resolved?
● How should a foundation reflect the need for internal and external transparency?

Compilation of two codes

Abuse of foundations can be combated either by more stringent supervision or by legislative intervention. The foundation law revision has attained this in part, for example by introducing regulations on creditor protection (auditing and accounting obligations; measures to be taken in case of debt and insolvency). The liberal approach advocates for self-regulation, which avoids the need for legislative interventions and restrictions. By setting their own foundation governance principles, the interested parties can preempt the call for tougher legislation.

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9. This statement cannot be confirmed yet due to lack of opinion data.

Abuse of foundations can be combated either by more stringent supervision or by legislative intervention

That was clearly the way to go: foundations should behave well of their own accord and in their own interests so that on the one hand need for state intervention does not arise, and on the other hand, their reputation and public confidence in them remain intact and are even strengthened.

Two working groups were then formed, each with the task of drawing up a code of best practice:

● The first working group was appointed by the presidential conference of large welfare organizations[10] in September 2003. They aimed for a code addressed to the management bodies of large non-profit organizations, not only foundations but also associations. The *Swiss NPO code* was decided upon on 19 January 2006 and finally approved on 31 March 2006 after editing.[11] The non-profit organizations to which the Swiss NPO code is addressed have other stakeholders such as members, sponsors and volunteers. Since voluntary work plays such an important role, the Swiss NPO code also deals with the relation between volunteers and fully employed staff.

● The second working group was appointed in summer 2004 by SwissFoundations. This was deliberately set up as an interdisciplinary team with expertise in corporate governance, foundation law, non-profit organization, and in particular foundation management. It compiled the *Swiss Foundation Code* that was completed in summer 2005 and published as Europe's first foundation code on 25 October 2005 in German, French and English.[12]

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The two working groups were in continuous contact both formally and informally, and considered for some time whether a joint code should be compiled. But the significantly different requirements and intentions made such a joint code impracticable. Notable in this connection is that the Council on Foundations, America's important umbrella organization for foundations, with more than 2000 members,[13] has issued *several* codes of best practice, each one for a different foundation form (family foundation, company foundation, etc.).

The Swiss NPO Code
Scope of validity

The Swiss NPO Code is directed at the bodies managing large non-profit organizations registered in Switzerland and covers both foundations and associations. It is primarily targeted at large aid organizations with high levels of donations and organizations that provide social services. The fact that the Code is intended for use by organizations that do not have the same legal form has sometimes led—in an attempt to achieve standardization—to the drafting of unwieldy concepts.

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10. Including: Brot für alle, Fondation Terres des hommes, Hilfswerk der Evangelischen Kirchen der Schweiz, Helvetas—Schweizer Gesellschaft für Internationale Zusammenarbeit, Krebsliga Schweiz, Pro Infirmis, Pro Juventute, Pro Senectute Schweiz, Schweizerische Rettungsflugwacht, Rotkreuz-Stiftung für Krankenpflege Lindenhof, Schweizerisches Arbeiterhilfswerk, Schweizerische Gemeinnützige Gesellschaft, Schweizerisches Rotes Kreuz, Schweizerischer Samariterbund, Stiftung Kinderdorf Pestalozzi, Swisscontact—Schweizerische Stiftung für technische Entwicklungszusammenarbeit, WWF Schweiz, Winterhilfe Schweiz.
11. <http://www.swiss-npocode.ch>.
12. Karl Hofstetter and Thomas Sprecher, *Swiss Foundation Code, Recommendations for the Establishment and Management of Grant-making Foundations* (Helbing & Lichtenhahn, Basel 2005), ISBN 3-7190-2393-1. Sold out immediately, this was followed early in 2006 by an undesignated reprint with a better English translation of the code.
13. <http://www.cof.org>.

Binding nature

The Swiss NPO Code is subject to the principle of 'comply or explain'. Those wishing to join the association representing large aid organizations in Switzerland must abide by this principle. In other words, they must follow the Code and, if they do not, they must specify and explain any deviation in their annual report.

Objectives

The Swiss NPO Code is designed to help non-profit organizations discharge their duties efficiently and effectively. In particular, it is designed to encourage:

- management bodies to be aware of and accept responsibility by creating transparent and independent management structures;
- a system of checks and balances within the organization;
- trust in the organization amongst the public, donors and public bodies;
- the reconciliation of honorary and professional work within the organization; and
- transparency by providing clear and independent information on the activities and results of the organization.

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Principles

The main principles of the Swiss NPO Code are as follows:

- Checks and balances
- Responsibility and efficiency
- Transparency

- Safeguarding the interests of members, sponsors, and volunteers
- Safeguarding the interests of donors.

In contrast to the Swiss Foundation Code, the NPO Code covers many additional stakeholders, in particular it also covers members of associations (foundations do not have members). In addition, the Swiss NPO Code considers it important to define the role of volunteers and the principles relating to cooperation between volunteers and professional staff.

In contrast to the Swiss Foundation Code, the NPO Code covers many additional stakeholders

Content

There is a chapter on the organizational structure of associations and one for foundations. Another chapter describes the organization and modus operandi of the most senior management body in associations and in foundations. Finally, a chapter is devoted to the role and duties of the chairman and management. In terms of accounting, reference is made to the Swiss accounting standard 'GAAP FER 21'. Particular importance is attributed to the need for an internal system of control. In terms of communication, it details the information that the senior management body is required to disclose.

The Swiss foundation code
Scope of validity

The Swiss Foundation Code also primarily refers to only *one* type of foundation, the *grant-making foundations*, defined as foundations not soliciting for donations and not dependent on public generosity, which use their own assets or income for supporting their own or third-party projects.[14] But other kinds of foundations, including those

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14. This is why, for example, fundraising is of subsidiary importance for the Swiss Foundation Code.

dependent on donations, can also reap benefit from this code.[15]

The Swiss Foundation Code also primarily refers to only one type of foundation, the grant-making foundations

Even among grant-making foundations, there is a wide variety of needs and organizational structures. The recommendations of the Swiss Foundation Code are mainly addressed to medium to large size foundations, but can be adapted to the circumstances of smaller foundations as well.

Non-binding nature

In contrast to the Swiss NPO code[16] the Swiss Foundation Code's objective *is* to be *non-binding.* Instead of directives, it makes recommendations.[17] It sets a framework and allows individual foundations to depart from this framework if need be. Given the great variety of foundation types, this is legitimate: what applies to foundations with large assets and complex organizations does not necessarily apply to small foundations. It can be assumed that with today's great variety of grant-making foundations, the Swiss Foundation Code would hardly have been accepted on a binding basis; that would have set up a stumbling block from the outset. To avoid this, a binding code would need to be based on the smallest common denominator, but then it would be rejected as weak and ineffective. And after all, SwissFoundations, which compiled the code, dates back only to 2001 and cannot yet claim any legitimate status as a quasi-lawmaker.

In contrast to the Swiss NPO code, the Swiss Foundation Code's objective is to be non-binding

Even if the Swiss Foundation Code is not binding, it will likely be taken as standard over the course of time, because the courts and supervisory authorities will in all probability refer to or at least take account of its recommendations for objective guidance with regard to due diligence.

Objectives

Good governance of grant-making foundations depends entirely on the integrity, judgement and competence of the persons responsible. The code is intended to make the foundation bodies aware of this. That is why its primary goal is to *ensure the effective, clear and transparent realization of the donor's wishes and the foundation's purpose.* Its application should engender confidence among the founders, the beneficiaries, the public and the supervisory authorities. It should encourage foundations to check their governance methods and improve them if necessary, and should also serve as a tool for interpreting the law.

Good governance of grant-making foundations depends entirely on the integrity, judgement and competence of the persons responsible

The code should not lead to red tape, but allow each foundation freedom of action within its specific circumstances. In particular, it should not unnecessarily restrict the founders. On the contrary, they must have enough freedom of action to bring their foundation's purpose to fruition.

Therefore, the Swiss Foundation Code must not be repressive or restrictive, but *constructive.* It is intended to illuminate the field of action of foundations and to enlighten their foundation boards with a view to the far greater expectations which are expressed by civil society today. It shows them the ideals for

15. This does not apply however to pension funds.
16. The Swiss NPO code obliges member organizations to follow the code on the 'comply or explain' principle. Deviations from the code must be individually explained and substantiated in the annual report.
17. Admittedly, the individual recommendations correspond to existing mandatory legislation and this should be made clearer in any subsequent revision.

which they should strive, and indicates ways of reaching them.

> *Therefore, the Swiss Foundation Code must not be repressive or restrictive, but constructive*

Principles

The Swiss Foundation Code is based on three principles:

● *Effective realization of the foundation's purpose*: 'The foundation is obliged to carry out the foundation's purpose as set out by the founder in the most effective, efficient and sustained manner possible.'
● *Checks and balances*: 'By taking appropriate organizational and administrative measures, the foundation ensures that, in all important decisions and dealings, there is a balance between management and monitoring.'
● *Transparency*: 'The foundation board ensures that the foundation's goals, activities and structures are as transparent as possible and appropriate to the foundation's purpose.'

These principles apply throughout the code, whose recommendations are all to be interpreted in their light. The principles themselves show how the code differentiates between foundations—meaning all the people working for them—and foundation boards.

Recommendations

The Swiss Foundation Code restricts itself to as little as 26 recommendations[18] divided into four areas:

● establishment;
● management;
● grants; and
● finances.

Each recommendation incorporates a guiding principle—normally formulated briefly—and a number of individual guidelines. For example:

Recommendation 8
The foundation board organizes and legally institutes itself. It likewise establishes practical operating procedures.

● The responsibilities of the foundation board are primarily carried out during foundation board meetings. These are convened at least twice a year. Depending on foundation requirements, however, they may also take place more frequently. Foundation board members must arrange their schedules so that they can participate in meetings.
● The foundation board prescribes the formalities for the convocation and holding of extraordinary foundation board meetings.
● Decision-making procedures are clear and comprehensible. Decisions are recorded in writing.
● The foundation board decides whether or not to consult independent advisors on important business matters.

In the same way, recommendations are made for handling conflicts of interests, assets investment and the management and execution of projects.

> *The foundation board organizes and legally institutes itself. It likewise establishes practical operating procedures*

Content

The code is more concerned with the 'constitution' of foundations than with their operating activities, and is therefore more restrained with regard to foundation management. Its principles and recommendations aim at an effective *foundation policy* and

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18. Swiss Foundations Code 2005: 22 recommendations.

foundation strategy. Nothing sensational is included, and its content is basically matter-of-fact. It is based on a *dynamic* interpretation of a foundation and its activities, and therefore uses the term *foundation management* rather than foundation administration.

> *Its principles and recommendations aim at an effective foundation policy and foundation strategy*

The Swiss Foundation Code is not intended to reinforce the state supervision of foundations, particularly as this already works very well. The state does not want more control either but instead wants to uphold a high degree of autonomy for grant-making foundations.

Commentary

A working group appointed by SwissFoundations and led by the author drew up a commentary to the Swiss

Foundation Code. It is illustrating the recommendations with well-founded and practice-related explanations. It was published in 2009.[19]

Further development and outlook

The Swiss Foundation Code will still be subject to periodic scrutiny and further development. This approach speaks well for the chosen path of dynamic and practicable self-regulation. It is highly probable that foundation governance will be an ongoing task in future for all those carrying responsibility for foundations.

> *The Swiss Foundation Code will still be subject to periodic scrutiny and further development*

19. Thomas Sprecher, Philipp Egger and Martin Janssen (eds) *Swiss Foundation Code 2009, Grundsätze und Empfehlungen zur Gründung und Führung von Förderstiftungen, mit Kommentar [Hrsg., mit]* (Helbing und Lichtenhahn, Basel 2009) (Foundation Governance Vol. 5); Thomas Sprecher, Philipp Egger and Martin Janssen (eds) *Swiss Foundation Code 2009, avec commentaire, Principes et recommendations pour la constitution et la gestion de fondations donatrices Adaption française: Parisima Vez* (Helbing und Lichtenhahn, Basel 2009) (Foundation Governance Vol. 6).